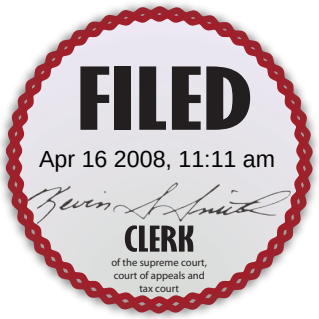

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IN THE
COURT OF APPEALS OF INDIANA

JACOB P. LEWANDOWSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0708-CR-480
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0605-FB-22

April 16, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jacob Lewandowski ("Lewandowski") pleaded guilty in Tippecanoe Superior Court to Class B felony burglary and Class B felony arson. He was ordered to serve an aggregate sentence of twenty-two years with four of those years suspended to probation. He appeals and argues that the trial court abused its discretion in its consideration of the mitigating and aggravating circumstances and that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

Facts and Procedural History

On October 7, 2005, Lewandowski, and his friend, Dustin Ricks ("Ricks") broke into Calvary Chapel intending to steal money. They located a safe that was bolted to the floor. They returned to Lewandowski's parents' home and retrieved a Sawzall and lighter fluid. They went back to the church, cut the safe from the floor, and put the safe in Ricks's vehicle. They then sprayed the church's office area with lighter fluid and lit the fluid with a lighter. The church sustained over $915,000 in damages as a result of the fire.

On May 1, 2006, Lewandowski was charged with two counts of Class B felony burglary, two counts of Class B felony arson, one count of Class B felony conspiracy to commit arson, one count of Class C felony conspiracy to commit arson, and one count of Class D felony theft. On June 13, 2007, Lewandowski pleaded guilty to one count of Class B felony burglary of a structure used for religious worship and one count of Class B felony arson of a structure used for religious worship. The remaining charges were dismissed.

A sentencing hearing was held on June 29, 2007. The court found the following aggravating circumstances: Lewandoski's prior juvenile adjudications, his history of substance abuse, the "extensive nature of the property loss surrounding this case," that Lewandoski is in need of correctional or rehabilitative treatment that can best be provided by commitment to a penal facility, and imposition of a reduced or suspended sentence would depreciate the seriousness of the crime. The court considered Lewandoski's guilty plea and young age as mitigating circumstances. After concluding that the aggravating circumstances outweighed the mitigating circumstances, the court sentenced Lewandoski to consecutive terms of twelve years for burglary and ten years for arson, for an aggregate sentence of twenty-two years. The court ordered four years of that sentence suspended to probation. Lewandoski was also ordered to pay restitution of $500 to Calvary Chapel and $915,057.04 to Church Mutual Insurance Company. Lewandoski now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Lewandowski argues that the trial court abused its discretion when it failed to consider certain mitigating circumstances and improperly considered certain aggravating circumstances. He also argues that his aggregate twenty-two-year sentence is inappropriate in light of the nature of the offense and the character of the offender.

"[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). "An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable,

probable, and actual deductions to be drawn therefrom.'" Id. (citation omitted). A trial court may abuse its discretion by failing to issue a sentencing statement, or issuing a sentencing statement that either bases a sentence on reasons that are not supported by the record, omits reasons both advanced for consideration and clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91. Yet, a trial court can no longer be said to have abused its discretion by improperly weighing or balancing aggravating and mitigating circumstances. Id. at 491.

First, we address Lewandowski's argument that the trial court should have considered the following mitigating circumstances: 1) that he obtained his GED, 2) that he maintained gainful employment for the four months he was released from jail, 3) he has recently participated in substance abuse counseling, and 4) that he is attempting to establish paternity to his alleged child.

> The finding of mitigating factors is within the discretion of the trial court. A trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited. "The allegation that the trial court failed to find a mitigating circumstance requires [the defendant] to establish that the mitigating evidence is both significant and clearly supported by the record."

McKinney v. State, 873 N.E.2d 630, 645 (Ind. Ct. App. 2007), trans. denied (citations omitted).

As Lewandowski argues, the first three proposed circumstances are supported by the record. However, he has not established that those alleged mitigating circumstances are significant, and therefore, the court did not abuse its discretion when it failed to consider them. With regard to the alleged paternity of the child, the court remarked, "Now I can't call it a mitigator that you [got] some girl pregnant." Tr. p. 93. The trial

court properly refused to consider the fact that Lewandoski may be the child's father as a mitigating circumstance.

Lewandowski also argues that the trial court abused its discretion in its consideration of the aggravating circumstances. First, Lewandowski correctly asserts that the trial court's written sentencing order contains inaccurate statements concerning his criminal history. However, at the sentencing hearing, the trial court correctly observed that Lewandowski committed false informing and auto theft "as a juvenile." Tr. p. 89. Because the trial court accurately considered Lewandowski's juvenile history at the sentencing hearing before imposing sentence, we conclude that the inaccuracy in the written sentencing order does not constitute reversible error. See Dowell v. State, 873 N.E.2d 59, 60 (Ind. 2007) ("This Court has the option of crediting the statement that accurately pronounces the sentence or remanding for resentencing.").

Lewandowski also asserts that the trial court abused its discretion by considering his pending misdemeanor charges for conversion and criminal recklessness as an aggravating circumstance because the charges were dismissed "as part of the disposition in this case[.]" Br. of Appellant at 17. Generally, a trial court may consider pending charges as an aggravating circumstance. See Bacher v. State, 722 N.E.2d 799, 804 (Ind. 2000) (sentencing court may properly consider as an aggravating factor pending charges not reduced to convictions because they reflect the defendant's character and indicate a risk of future crime). However, a defendant who is sentenced "more harshly in reliance upon" facts comprising the basis for charges dismissed pursuant to a plea agreement, does not receive the full benefit of his plea agreement. See Farmer v. State, 772 N.E.2d

1025, 1027 (Ind. Ct. App. 2002). Because the State informally agreed to dismiss Lewandowski's pending charges as a result of his plea agreement in this case, the trial court abused its discretion when it considered the pending charges as aggravating.

Next, Lewandowski contends that the trial court abused its discretion when it considered the following aggravating circumstance: Lewandowski is in need of rehabilitative treatment that can best be provided by commitment to a penal facility. Lewandowski has a continuous substance abuse problem and has participated in more than one treatment program without success. Moreover, he failed to complete his probation successfully for his juvenile adjudications for auto theft and false informing. See Tr. p. 92 ("So there have been prior attempts at rehabilitation and you haven't taken advantage of 'em."). The trial court did not abuse its discretion when it considered this aggravator.

The trial court also considered as aggravating that imposition of a reduced sentence would depreciate the seriousness of the crime. Lewandowski contends that consideration of that circumstance was improper because there was "no indication that the court was considering a reduced sentence."[1] Br. of Appellant at 16. "[I]t is improper for the trial court to use the aggravating circumstance 'that imposition of a reduced sentence would depreciate the seriousness of the crime' when the trial court does not consider imposing a reduced sentence." Roney v. State, 872 N.E.2d 192, 200 n. 3 (Ind. Ct. App. 2007), trans. denied (citing Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997)).

[1] At the sentencing hearing, Lewandowski argued that he should receive ten years for each offense with a "substantial portion of the executed portion of that [served] through Community Corrections [and] substance abuse counseling[.]" Tr. p. 86.

There is nothing in the record indicating that the trial court was considering a reduced sentence. Therefore, consideration of this aggravating circumstance was improper.

The trial court also found the "extensive nature of the property loss surrounding the case" as an aggravating circumstance. Lewandowski argues that the trial court improperly considered this circumstance because pursuant to the plea agreement, the State dismissed a second count of arson with a pecuniary loss of at least $5000. "If a trial court accepts a plea agreement under which the State agrees to drop or not file charges, and then uses facts that give rise to those charges to enhance a sentence, it in effect circumvents the plea agreement." Roney, 872 N.E.2d at 201.

The State asserts that "the court could yet have imposed an enhanced sentence" because "the harm was significant and greater than the elements necessary to prove the commission of the offense." Br. of Appellant at 11 (citing Ind. Code § 35-38-1-7.1 (2004 & Supp. 2007)). Pursuant to Indiana Code section 35-43-1-1, the offense of arson is a Class B felony if the pecuniary loss is at least $5000 or the damaged structure is "used for religious worship[.]" Lewandowski was charged under both subsections of the statute, and the State agreed to dismiss the charge based on the pecuniary loss of at least $5000. Lewandowski could not have been convicted of both counts of arson; therefore, it is reasonable to conclude that his decision to plead guilty was not influenced by dismissal of that count of arson. For this reason, that the court relied on the fact that the arson resulted in more than $915,000 in damages to the church does not have the effect of circumventing the plea agreement. Accordingly, we conclude that the trial court properly considered the substantial damage to the church as an aggravating circumstance.

Although the trial court abused its discretion when it considered the charges pending against Lewandowski at the time of sentencing and that imposition of a reduce sentence would depreciate the seriousness of the crime, the remaining aggravating circumstances support the trial court's decision to impose consecutive terms of twelve years for burglary and ten years for arson.

Finally, Lewandowski argues that his aggregate twenty-two-year sentence is inappropriate in light of the nature of the offense and the character of the offender. Pursuant to Indiana Appellate Rule 7(B), our court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As a juvenile, Lewandoski committed the offenses of false informing or reporting and auto theft. He also regularly abused alcohol and marijuana and continued to abuse those substances even though he participated in several treatment programs. Concerning the nature of the offense, Lewandoski burglarized a church, stole the church's safe, and then set the church on fire in an attempt to destroy the evidence of the crime. The church sustained over $915,000 in damages as a result of his arson. For all of these reasons, we conclude that his aggregate twenty two-year sentence, with eighteen years executed and four years suspended to probation, is not inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.